IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 37

HEWITT-ROBINS INCORPORATED,
Petitioner,

v.

EASTERN FREIGHT-WAYS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

MILTON D. GOLDMAN,
29 Broadway,
New York 6, N. Y.,
Attorney for Respondent.

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BRIEF FOR RESPONDENT

Statute Involved

In addition to subdivision (j) of Section 216, specified by the petitioner, there is more directly involved upon this appeal subdivision (b) of Section 216 of the Motor Carrier Act [49 U. S. C. 316(b)], fully set forth in the Appendix hereto.

Question Presented

In accordance with Rule 40(3) of this Court, the respondent submits that the true question presented upon this appeal is

Whether Section 216 of the Motor Carrier Act created a statutory cause of action whereby a shipper of goods may recover a portion of rates paid in accordance with applicable filed tariffs, upon a finding by the Interstate Commerce Commission that the carrier's use of the higher rated of two available routes was unreasonable within the meaning of Section 216 of the Motor Carrier Act.

Statement

Under well-established principles, the allegations of the complaint (R. 1-3) must be given their fair import and be accepted as true for the purposes of this appeal. Nevertheless the petitioner has not alleged that during the two years in question it never acquiesced in the use of the interstate route, or that there was never an agreement for interstate carriage at the applicable rate now assailed as excessive. Nor is there any allegation that the respondent was guilty of fraud or discriminatory practices.

The petitioner's action is predicated solely on the bald fact that the respondent routed the shipments in question over its higher rated interstate route, and the alleged right to recover is specifically assigned to the regulatory provisions of the Motor Carrier Act (the "Act"). Thus the complaint, obviously prepared with great care, declares that "The action arises under Part II of the Interstate Commerce Act, U. S. Code, Title 49, Sections 301 to 327, inclusive, as hereinafter more fully appears" (R. 1), and the gravamen is expressed to be a "violation of Section 216, Part II, of the Interstate Commerce Act" (R. 2). This is and has been the theory of petitioner's action, as conclusively evidenced by its immediate resort to the Interstate Commerce Commission (the "Commission") for a determination of reasonableness under Section 216 of the Act.

The respondent's answer denies the petitioner's allegations of unreasonableness and contains three affirmative defenses. The third defense alleges, *inter alia*, that the petitioner agreed to the use of respondent's interstate route by way of respondent's New Jersey terminal for the purpose of assembly, breakdown and delivery, and that petitioner's less-than-full load shipments could not be handled as direct intrastate shipments (R. 7). Thus, the reasonableness of respondent's routing practice was squarely placed in issue by the pleadings.

This appeal, then, does not involve the question of a shipper's right to recover based on fraud, discrimination, overcharges, or any deliberate wrong, but only on a post-shipment finding by the Commission that the carrier's routing practice was inherently unreasonable as that standard is construed under the Act.

ARGUMENT

I

The complaint purports to plead only a *statutory* cause of action which the *T.I.M.E.* case squarely held was not created by the Motor Carrier Act.

Whether the petitioner's complaint be regarded as attempting to plead a statutory or common-law cause of action, it fails to present a justiciable issue upon which relief may be granted. However, the most liberal construction of the complaint fails to disclose reliance upon a common-law right.

The complaint and subsequent proceedings before the Commission very clearly reveal the petitioner's understanding of its rights and the law when it brought its action. The petitioner properly recognized (1) that the respondent's duty to adopt reasonable routing practices was governed solely by Section 216 of the Act, and that (2) the reasonableness of the routing practice in question was determinable by the Commission in the exercise of its primary jurisdiction. The petitioner's claimed right of recovery was predicated solely upon the respondent's alleged failure to comply with a statutory duty. However, when confronted by respondent's motion to dismiss under the authority of this Court's decision in *T.I.M.E., Inc.* v. *United States*, 359 U. S. 464 (1959), the petitioner adapted the government's alternative common-law argument made in that case to the circumstances of the case at bar.

The respondent emphasizes the foregoing principally to illustrate to this Court that shippers and carriers alike

have understood and accepted the exclusivity of the Act, and its pre-emptive effect, insofar as it fixes and attempts to regulate with uniformity the several duties of motor carriers engaged in interstate commerce, including the duty to adopt reasonable routing practices.

Section 216(b) of the Act, upon which the complaint is predicated, does not create a cause of action to recover reparations for violations thereof.

T.I.M.E., Inc. v. *United States*, *supra*, at 469; *cf. Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246 (1951).

The decision in the *T.I.M.E.* case is unanimous upon this point. This Court held that Section 216 established "only a 'criterion for administrative application in determining a lawful rate' rather than a justiciable legal right" (at p. 469).

Although the precise duty in issue in the *T.I.M.E.* case was the duty to establish reasonable rates, this Court's construction was very evidently placed upon the entirety of Section 216(b) and the several duties imposed therein. As was held by the Commission in the instant case, the duty to adopt reasonable routing practices is enjoined by that Section.

Hewitt-Robins Incorporated v. *Eastern Freight-Ways, Inc.*, 302 I.C.C. 173, 174 (1957).

This is recognized and conceded by the petitioner's complaint.

The applicability to this case of the holding in *T.I.M.E.* is clear not only from this Court's broad language of construction, but from its underlying rationale as well. Thus,

the conclusion in *T.I.M.E.* upon this point was dictated by the compelling circumstances that the Act, unlike Parts I and III of the Interstate Commerce Act, withheld reparations procedures for violations of the Act, and that attempts to amend the Act to include such provisions were consistently unsuccessful. The Act withheld reparations not only for unreasonable rates, but any other unreasonable practices including the collection of applicable rates deemed excessive as a result of a routing practice deemed unreasonable. The proposed amendments were correspondingly broad. Thus, the amendments considered in 1947 and again in 1957 each provided:

> "In case any common carrier by motor vehicle subject to the provisions of this part shall do * * * *any act, matter or thing in this part prohibited or declared to be unlawful,* * * * such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation * * *." (Emphasis supplied.)
>
> Hearings before Senate Committee on Interstate and Foreign Commerce on S. 378, 85th Cong., 1st Sess. (1957);
>
> Hearings before House Committee on Interstate and Foreign Commerce on H.R. 2324, 80th Cong., 1st Sess. (1947).

Significantly, identical legislation was again unsuccessfully proposed *after* this Court's decision in *T.I.M.E.* (See H.R. 8031, dated June 30, 1959).

The foregoing, together with other legislative history discussed in part 2 of the *T.I.M.E.* opinion, make it abundantly clear that Section 216(b) did not create a cause of action in favor of a shipper under the circumstances of this case.

II

There is no surviving common-law right upon which the Petitioner can predicate a recovery.

The respondent feels the petitioner has presented this Court with a moot question, in light of the pleadings and circumstances of this case. However, the grant of certiorari by this Court compels argument upon the merits of that contention which is not only unsupportable in legal principle, but is bereft of any equity as well (see "The Equities," *infra*).

Second T.I.M.E. Holding Controls

The petitioner's contention should be rejected under the second holding in *T.I.M.E.*, to wit, that Section 216(j) of the Act [49 U.S.C., [316(j)] did not preserve any pre-existing common-law right to recover reparations on account of rates deemed unreasonable under the Act.

The second *T.I.M.E.* holding was grounded upon the fact that the issue of reasonableness was subject to the primary jurisdiction of the Commission. Accordingly, this Court held that the reparations procedure contended for was incompatible with the Act because (1) the Courts would have "no authority to adjudicate the primary question in issue" (at page 474), and (2) the Commission would be permitted "to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly" (at page 475).

The foregoing rationale is applicable with equal force to the instant case. The sole issue tendered by the *factual allegations* of the complaint is whether the respondent's routing practice was unreasonable. "Misrouting is an

unreasonable practice violative of the provisions of Section 216(b) of the act * * *."

> *Hewitt-Robins, Incorporated* v. *Eastern Freight Ways, Inc., supra*, at p. 174

This issue falls squarely within the primary jurisdiction of the Commission.

> *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483 (1918);
>
> *Miller* v. *Davis*, 213 Iowa 1091, 230 N. W. 743, 744-45 (1932);
>
> *Great Atlantic & Pacific Tea Co.* v. *Ontario Freight Lines Corp.*, 461 I.C.C. 237, 238-39 (1946);
>
> *Kahn*, Principles of Motor Carrier Regulation 156 (1958);
>
> *cf. T.I.M.E. Inc.* v. *United States, supra;*
>
> *cf. Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1906).

The petitioner concedes the Commission's primary jurisdiction over the sole issue in this case (Pet. Brief, pp. 10, 12). Thus, there is no dispute upon the crucial predicate of the *ratio decidendi* in *T.I.M.E.* The same conclusion inexorably results.

The remedy urged by petitioner (Pet. Brief, p. 12) is utterly repugnant to the scheme of the Act which pronounces a general policy of regulation without reparation. It would entail a hybrid *non-statutory* procedure which would constitute the Court as the mere paying agent of the Commission, from whom Congress has specifically withheld

the reparations power. This result falls squarely within the prohibition of *T.I.M.E.*, and the authorities which guided this Court's sound conclusion.

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co., supra;*

Texas & Pacific R. Co. v. *Abilene Cotton Oil Co., supra.*

The Act's legislative history which was considered in *T.I.M.E.* is equally persuasive here. It dictates the conclusion that Congress did not intend that the Act would be survived by a common-law right of action to recover a portion of rates deemed excessive as a result of an unreasonable routing practice. The Court is respectfully referred to the discussion on legislative history under Point I of this brief.

Apropos of the issue here is *Consolidated Freightways, Inc.* v. *United Truck Lines, Inc.*, 216 F. 2d 543 (9th Cir. 1954). In that case the Court held that the scheme of the Act precluded the maintenance of an action by one carrier against another for unfair competition. In so holding it declared:

> "In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as a wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself" (at p. 545).
>
> * * *
>
> "It is abundantly clear that Congress intended regulatory controls to be exercised by the Commis-

> sion and not by or through individuals. There is absolutely no indication in this Act or in case law that private suits might be resorted to, to aid the Commission in its enforcement of the Act and regulations thereunder" (at p. 547).

Consolidated Freightways correctly prophesied the decision in *T.I.M.E.*, and represents an excellent expression upon the Congressional intent to be considered on this appeal.

Petitioner's Contentions

The petitioner utterly fails to suggest one cogent reason why *T.I.M.E.* does not require an affirmance here.

1. The hypothesis of petitioner's argument seems to be that there is an enforceable common-law standard or duty which derives its substance from some authority independent of Congress and the duty expressed in Section 216(b) of the Act. Even were this possible, the petitioner fails to establish the applicable law of New York State which, under its theory, would govern the shipments in question. However, even to suggest that New York law would govern the respondent's duties reveals the fallacy of the petitioner's contention.

Under established principles of federal pre-emption, the prescription by Congress of certain duties under Section 216, as administered by the Commission, superseded and abrogated all existing common-law standards prevailing in the various jurisdictions with respect to the same subject matter.

> *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*, *supra*, at 547;

Cf. *W. R. Grace & Co. v. Railway Express Agency, Inc.*, 8 N. Y. 2d 103, 105 (1960).

That was the essential purpose of the Act—uniform regulation. Were the petitioner correct in principle, motor carriers would be bound by the Act and, simultaneously, by multiple standards at possible variance with Section 216, each subject to change by the jurisdiction concerned. Such a proposition is untenable. There is no dual standard. If a routing practice is reasonable under Section 216, it is not otherwise open to attack. If it should be held to violate that Section, no other standard is competent to justify it.

The pre-emptive character of Section 216 should, it is respectfully submitted, conclude this entire controversy under the first holding in *T.I.M.E.* If a failure to comply with Section 216 was not intended by Congress to give rise to an actionable wrong, there would seem to be no need to consider whether a proposed "common-law" remedy is compatible with the Act, as was done in *T.I.M.E.* There is no other duty to enforce.

Petitioner incorrectly suggests there have been adjudications which recognize a surviving common-law remedy. *Woolgar Transportation Co. v. George Rathdge Co.*, 162 F. 2d 1016 (3d Cir. 1947), merely held that the carrier was bound by its *express contract* of intrastate carriage which it could not unilaterally abridge by using an interstate route without justification.

Exceedingly inaccurate is petitioner's recital upon *S. W. Shattuck Chemical Co. v. T. & M. Transp. Co.*, 134 F. 2d 294 (10th Cir. 1943) and *T. & M. Transp. Co. v. Shattuck Chemical Co.*, 148 F. 2d 777 (10th Cir. 1945). It was there held that where a shipper knows a specific

route will be used, the carrier may recover the applicable rate although it had originally quoted a lesser rate to the shipper. However, there was *dicta* in *Shattuck* to the effect that a carrier may be liable in damages where it affirmatively misrepresents which route will be used. Neither *Woolgar*, nor *Shattuck* was concerned with shipments tendered wholly enrouted, the reasonableness of a routing practice, the jurisdiction of the Commission, or the effect of the Act upon the issue presented by the instant case. Moreover, those decisions antedate *T.I.M.E.*

2. Arguing that the Act did not abolish *all* common law actions, petitioner cites *Riss & Company* v. *Association of American Railroads*, 178 F. Supp. 438, 446 (D. C. Cir., 1959). Although *Riss* does make that general statement (with which respondent does not disagree), it properly acknowledged that under the *T.I.M.E.* and *Abilene* decisions, *supra*, the Act extinguished all common-law actions which are *inconsistent* with the statutory plan. Accordingly, it denied the right of the defendant railroad to counterclaim for loss of profits against the plaintiff motor carriers on account of alleged unlawful competition.

Just as Section 216(j) provides, the Act concededly did not extinguish "any remedy or right of action not inconsistent" therewith. However, the remedy sought here, just as the one rejected in *T.I.M.E.*, is inconsistent. An action for overcharges may be maintained not only because it does not involve the administrative judgment, but because Section 204(a) of the Act specifically recognizes it. It is consistent with the Act. The case at bar is not an action to recover overcharges.

Kahn, op. cit. supra, at p. 156;

Great Atlantic & Pacific Tea Co. v. *Ontario Freight Lines Corp., supra* at 239;

Miller v. *Davis*, *supra*, at 744;

cf. *Brown Coal Co.* v. *Director General*, 87 I.C.C. 130, 131 (1923);

a distinction precisely made in *Miller* v. *Davis*, *supra*.

3. That this case involves only the issue of reasonableness is clearly established by the authorities cited above under "Second *T.I.M.E.* Holding Controls". Petitioner attempts to neutralize this obvious proposition by disowning those allegations of its complaint (Pet. Brief, pp. 8-9), and quoting language out of context from *Galveston, H. & S. A. Ry. Co.* v. *Lykes Bros.*, 294 Fed. 968 (S. D., Texas, 1923), and *Miller* v. *Davis*, *supra*. Neither of those cases support the petitioner. *Lykes Bros.* was concerned only with the effect of a stipulation of settlement of a rate claim upon the carrier's right to recover an amount in excess of the settlement. *Miller* v. *Davis* was concerned only with a shipper's right to recover the excess amount of rates where the carrier did not plead in justification of the more expensive route. Had the carrier so pleaded, *Miller* v. *Davis* specifically held there would be a question of reasonableness for the Commission (240 N. W. at 744-45).

Petitioner's insistence upon characterizing the issue as "misrouting" is merely the use of semantics to avoid an inevitable result. It is a particularly pointless tactic in view of petitioner's own admission that the issue relating to respondent's routing practice is referable to the Commission, and the Commission's holding that misrouting is an "unreasonable practice".

4. Petitioner argues that the Commission may function in aid of the Court just as it did in *United States* v. *Western Pac. R. Co.*, 352 U. S. 59 (1956), and *United States* v.

Chesapeake & Ohio Ry. Co., 352 U. S. 77 (1956). However, in those cases the right to recover was conferred by statute and was unchallenged. The question here is not whether the Commission has jurisdiction of the issue, for the petitioner concedes that, but whether its primary jurisdiction negates a legislative intent to permit a remedy which was specifically withheld. This distinction was well made in *T.I.M.E.* at page 475. *West Tennessee Motor Express, Inc.* v. *Dyersburg Cotton Products, Inc.*, 298 F. 2d 710 (6 Cir. 1962), is inapplicable for the reason, among others, that it was an action by a *carrier* to recover a filed tariff. The question of the applicability of the tariff was referred to the Commission.

5. As its last line of attack, the petitioner attempts to distinguish the *T.I.M.E.* decision upon the ground that Sections 216 (g) and 217 (c) afford protections against unreasonable rates which are not available with respect to routing practices. In the first place, the decision in *T.I.M.E.* was clearly not predicated upon those sections. But more important, the fact is that subdivisions (e) and (g) of Section 216 [49 U. S. C. §316 (e) (g)] afford the same measure of administrative scrutiny over routing practices, and the same opportunity for shippers to file complaint. There is no need to discuss those sections. Their provisions are clear.

The Equities

The petitioner seeks to strengthen its legal argument by attempting to construct a foundation of equity in its favor. (Pet. Brief, pp. 12-13). In point of fact, the balance of equities is with the respondent.

As noted under "Statement", *supra*, the complaint does not allege fraud, discrimination or even deliberate mis-

routing by the respondent. Such a charge would be unfounded. Moreover, any extended or flagrant conduct of that kind would subject a carrier to penalties far too severe to warrant the risk for the sake of *a few dollars*. The Court's attention is respectfully directed to Sections 212, 216(d)(e)(g), 217(a), 218(a), and 222 of the Act [49 U.S.C. §§ 312, 316(d)(e)(g); 317(a), 318(a) and 322]. There is ample provision in the Act, as well as in general criminal statutes, to prevent and punish any motor carrier which, as the petitioner phrases it, "may be tempted to prey upon the unprotected shippers by resorting to the technique of misrouting shipments and pulleting the shipping public of millions of dollars a year without fear of civil prosecution" (Pet. Brief, p. 13).

The petitioner distorts the grievance it presses to redress. The Commission has merely found that the respondent instituted and maintained a routing practice which the circumstances did not warrant. There is not the slightest suggestion of wrongful conduct in the Commission's opinion which the Court is respectfully requested to examine. The issue was truly one of reasonableness.

An erroneous routing practice does not produce a windfall for the carrier where, as here, it merely charges the applicable rate under published tariffs. The rate has been approved by the Commission and is a fair charge for the service *actually* rendered. It is fixed under Section 216(i) [49 U.S.C. 316(i)] of the Act. Petitioner can hardly suggest that the carrier profits to the extent of the difference between the rate charged and the cheaper rate in this case an average of only $28.57 per shipment, assuming petitioner's demand is correct. A recovery against respondent would require it to return a sum in excess of the small margin of profit permitted. On the other hand, a recovery by petitioner would produce a windfall of

$10,000, with interest for approximately five years. Yet, petitioner's consignee and subsequent consumers have most assuredly absorbed the shipping costs at the rate regularly charged and now assailed as excessive.

To permit a recovery would subject every motor carrier in the nation to the devices of parasitic claims solicitors, who will volunteer to conduct audits and instigate claims solely for their own enrichment. The case at bar is one such example—a lawsuit after 350 shipments upon a regular basis at the applicable rate. A sudden rush of claims would hardly benefit shippers or the general public, and they would make no significant contribution to the regulation of the motor carrier industry.

The respondent does not contend that shippers should be obligated to pay rates in excess of those applicable to the least expensive reasonable route. It does contend, however, that the Act seeks to protect them by way of regulation only, which includes a procedure whereby, as in the instant case, a shipper may contest the reasonableness of a routing practice and procure its termination. If a reparations remedy is to be engrafted upon the statutory scheme, it must be by legislative enactment.

The *T.I.M.E.* case and sound principles of law would seem clearly to require an affirmance of the judgment entered below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MILTON D. GOLDMAN,
Attorney for Respondent.

WILFRED R. CARON,
of Counsel.

APPENDIX

Subdivision (b) of Section 216 of Part II of the Interstate Commerce Act (49 U. S. C. § 316(b)) provides as follows:

> "(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."